Supreme Court, U.S.
FILED
MAR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1438 (2)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLOTTE MEMORIAL HOSPITAL AND
MEDICAL CENTER, ET AL,

Petitioners

v.

WILMA OLIPHANT, ET AL,

SUPPLEMENTAL APPENDIX
TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN O. POLLARD
WHITEFORD S. BLAKENEY
Attorneys for Petitioners
and Counsel of Record
3700 NCNB Plaza
Charlotte, NC 28280
(704) 372-3680

Of Counsel:
BLAKENEY, ALEXANDER & MACHEN
Charlotte, NC

82pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

INDEX

	Page No.
RULING ON PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, NOVEMBER 29, 1985 -	1sa
FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, JUNE 20, 1983 -	3sa
JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, JUNE 21, 1983 -	60sa

lsa

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 83-1772

Wilma Oliphant, et al.

Appellees,

versus

Charlotte Memorial Hospital,
et al,

Appellants.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge

---

The appellant's petition for rehearing and the appellees' motion for clarification and petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion

for rehearing in banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied.

IT IS ORDERED that the petitions for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman with the concurrence of Judge Russell and Judge Hall.

For the Court,

/s/ John M. Greacen
CLERK

FILED

NOV 29 1985

U. S. Court of Appeals
Fourth Circuit

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-78-326-M
WILMA OLIPHANT; TERRY RAGIN; BERNICE HOWIE; BERTHA ANDERSON; and RUTH COLEMAN, individually and on behalf of all others similarly situated,
Plaintiffs,

-vs-

CHARLOTTE MEMORIAL HOSPITAL and MEDICAL CENTER; and CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

C-C-78-370-M
CHARLES NORWOOD; LULA B. MILLER; EVELYN ALEXANDER and YVONNE SESSOMS,
Plaintiffs,

-vs-

CHARLOTTE MEMORIAL HOSPITAL and MEDICAL CENTER; and CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY,
Defendants.

J. LeVonne Chambers, Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A. Suite 730 East Independence Plaza, 951 S. Independence Boulevard, Charlotte, NC 28202; and Michael A. Sheely, 418 Law Building, Charlotte, NC 28202, counsel for plaintiffs.

John O. Pollard, Blakeney,Alexander & Machen, 3450 NCNB Plaza, Charlotte, NC 28280, counsel for defendants.

Before, James B.McMillan, District Judge

I.

PRELIMINARY STATEMENT

These cases were tried from October 21 through October 30, 1981. On November 30, 1981, the court issued a nine-page memorandum of decision and order, which appears of record, making findings and conclusions with reference to defendants' patterns and practices of racial discrimination as shown by the evidence in the trial, and findings and conclusions with regard to discrimination -- and lack of it -- as to named plaintiffs and some of the class members. Counsel for plaintiffs were directed to prepare proposed detailed

findings of fact and conclusions of law. Those were forwarded to the court, reviewed by the court, and sent back to plaintiffs with a number of changes for re-drafting. That 97-page re-draft, a voluminous rendering of my original memorandum of decision, is in hand. However, in view of the condemnation in recent cases by the Fourth Circuit Court of Appeals of the use by judges of findings and conclusions prepared by counsel, I have not adopted counsel's work but have, at considerable labor, prepared the following. Because it tries to be faithful to the facts, it smacks heavily of the contents of the original memorandum and of the plaintiffs' offering. It is "an ill favored thing, Sir, but mine own,"[1] -- and I trust it will

---

[1]Touchstone, of Ardrey, W. Shakespeare, As You Like It, Act V., Scene iv., l.60.

be treated as "mine own" by any who read it.

II.

FINDINGS OF FACT

A. Patterns and Practices of Discrimination.

1. Plaintiffs, black employees of and applicants for employment at Charlotte Memorial Hospital, brought these two suits, alleging that defendants had violated their rights and those of proposed class members under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq., as amended, and 42 U.S.C. §§1981 and 1983.

2. After due consideration, classes were certified as follows:

In the Oliphant case:

> Plaintiffs, all blacks currently employed by defendant hospital in clerical positions and all blacks employed by defendant at any time since December 6, 1975, in a clerical position who are not currently

employed; all of whom have been or may have been discriminated against in reference to defendants' policies covering promotion, transfer, job placement, termination, discipline, and unfair job performance evaluations on account of their race.

In the Norwood case:

> All black applicants for employment or training with and all black employees of defendant Charlotte Memorial Hospital and Medical Center who, at any time since April 24, 1972, have been denied employment or training opportunities, promotions, transfers, equal wages or who have been denied equal performance evaluations, disciplined or discharged in a discriminatory manner because of their race and color or in retaliation because of their efforts to exercise rights under Title VII. This class includes both professionals and non-professionals.

3. Claims with reference to professionals (physicians, dentists and nurses) were settled before the trial was concluded.

4. Defendant Charlotte-Mecklenburg Hospital Authority is a public corporation chartered by the State of North Carolina.

It owns and operates the Charlotte Memorial Hospital and Medical Center, a complex medical service and training facility.

5. Between 1972 and the date of trial in October, 1981, the Hospital employed approximately 3,500 employees; about 38% or 39% of those have been black. Employees are assigned to approximately fifty divisions and departments in job positions ranging from non-skilled to professional and highly skilled, including staff physicians. Employees are assigned to approximately 450 job codes, approximately sixty of which required registry, certification or licensure.

6. The directors of the medical and dental programs and the director of legal affairs have always been white. The hospital

has a director, a deputy director, and seven associate directors, all of whom have been and are white. One black served as an assistant to an associate director during 1978. No black has ever served as manager of any of the fifty departments. Blacks have held some assistant managerial positions and some supervisory positions in nursing, pharmacy, environmental services and laundry.

7. In 1979, eighteen of the fifty departments had no black employees. About 70% of the black employees in 1979 were in nursing, environmental services, dietary or food handling, laundry and central services. In those departments their roles were those of licensed practical nurses, nurses' aides, janitors, cleaners, cafeteria workers and laborers. By race, those

departments in 1975 and 1979 were composed as follows:

	1975		1979	
	White	Black	White	Black
Nursing	1135	596	1082	495
Environmental Services	33	146	23	174
Dietary	88	226	67	159
Laundry	3	52	5	54
Central Services	16	70	5	50

Black employees have been concentrated in low paying jobs. Wage differentials ranged from about 29¢ per hour in 1975 to a high of 64¢ per hour in 1978 between black and white employees, with comparatively equal or similar education, length of service, departmental assignment and work schedules. Supervisory staffs in majority black departments were mostly white. Black supervisors were often not accorded equal status and supervisory

duties with white supervisors, and in environmental services the uniforms of black and white supervisors were different.

8. Blacks as a rule were initially employed into the lowest paying jobs, especially janitorial and food handling work, and tended to remain in such work.

9. Discriminatory hiring, promotion and transfer policies were followed, as evidenced by:

(1) Notices of vacancies were not posted at all until late 1978, at which time posting in the personnel office only was begun. It was not until mid-1979 or later that posting in the rest of the hospital was done on any regular basis.

(2) Employees were not advised of forthcoming job vacancies, even in their own departments, unless they had been chosen as candidates for a vacancy.

(3) Persons selected by management for promotion or transfer were individually and privately consulted

before the vacancy was announced or created.

(4) In the personnel office, lists of vacancies were kept secret from the public and from applicants, and interviewers were close-mouthed with information about vacancies until they had determined what particular vacancy a particular visitor was interested in.

(5) Hiring, promotion and discharge policies were not complete nor up to date, and they were not kept in a book nor in any one place where they could be found and regularly consulted, even by personnel officers.

(6) No written criteria were available to interviewers and selection officers to guide even the interviewers and selection offers in choosing among applicants. Decisions to employ were based upon substantially unguided, subjective personal opinions and judgments.

(7) One black was told that a job would require a college degree; without notice to her, the college degree requirement was suspended and

a white person without a college degree was hired.

(8) Training programs were started without opportunity for blacks to apply and participate.

(9) White people of choice were selected and alerted and trained to fill openings before blacks knew about the vacancies or were given an opportunity to bid on them.

(10) Subjective judgments of supervisors or interviewing officers were all too frequently exercised in favor of white applicants, for promotion, for training, for transfer, or advancement.

(11) Blacks were denied lateral transfers while whites were permitted them.

(12) Blacks were subjected to arbitrary and inconsistent time periods they had to remain in a job before promotion or transfer.

(13) College education, irrelevant to the requirements or needs of a job, was sometimes required. Blacks who don't have as many college degrees as whites, were prejudiced by this requirement.

(14) Unofficial policy was that

blacks had to do well in their original job before any transfer was allowed.

(15) Written requests for promotion or transfer were not required of whites. Blacks' requests for promotion or transfer were ignored or disregarded because not in writing.

9. Retaliation against blacks who aggressively or persistently sought employment or advancement was carried out in the form of:

(1) Critical fitness reports and "anecdotals" for blacks who pushed for promotion.

(2) Critical notations in personnel files of blacks who filed charges with the Equal Employment Opportunity Commission.

(3) Pressure upon blacks in the form of heavier criticism of work and bad marks on fitness reports and discriminatory criticism or discharge of blacks for tardiness or absenteeism.

(4) The "documentation" of records which would provide the basis

for ultimate discharge and, when necessary, for denial of promotion or other job opportunities for blacks who had had the temerity to challenge or sue the hospital.

B. Discrimination with regard to Named Plaintiffs and Class Members.

10. Pamela Bennett, a member of the class, is black. She started work in October, 1970, as a file clerk in the personnel department. In June, 1972, she became a personnel secretary; in the summer of 1974, an accounts payable clerk in the accounting department; and in the fall of 1978, a maintenance accountant in the maintenance department.

In September, 1981, her job in maintenance was phased out, and she applied for transfer to a job as patients' accounts officer in the business office handling patients' accounts. She heard

the position was open; asked the supervisor, Ms. Dollinger, for the job; was interviewed; but was not hired. She was told that Bob Kenan, a white male, had already been interviewed from the outside. The job consisted of checking up on how patients would pay their hospital bills. Bennett, because of her experience as accounts payable clerk and in other capacities, was better qualified than Kenan. She was denied the job because of her race. Defendants did not "articulate" any other reason.

Bennett also claims that, when Johnny Flowers resigned in March of 1981, she was denied Flowers' job as administrative assistant in the maintenance department. That job consisted of receiving orders from the maintenance people for needed

supplies and equipment, and following up orders placed with vendors of equipment. Bennett was experienced in this work and capable of doing it, and had in fact performed the job for several weeks in March and April of 1981 after Johnny Flowers had departed. She did not make application for Flowers' job, but that is of no special sig..ificance because (1) Mr. Culp, the director of maintenance, had asked her before Flowers left if she thought that a person with eleven years' experience in sales could handle the job, and she replied "Yes, anybody could," and (2) Culp testified that he in fact considered Bennett for the job, but passed her up in favor of Ledbetter. From this exchange, she testified, she knew that somebody had already been selected and

that there was no need to apply. She, in fact, trained Pat Ledbetter, the white woman who was hired from outside the hospital, for the job. (Ledbetter's experience had been dealing with purchasing agents rather than selling agents.) Bennett was denied the administrative assistant job because of her race. The defendants' explanation (that the director was looking for someone who was "self initiating" who would "take the position and develop it") are not taken at face value by the court and are deemed pretextual. It is of further interest that only white employees have been promoted in that department since Mr. Culp became its department head in 1979.

Bennett is entitled to appropriate relief based upon her denial of appointment

to both of the two jobs mentioned above.

11. Ruth Coleman, a named plaintiff, was first employed by the defendant in July, 1975, as a CETA (Comprehensive Employment Training Act) employee. She was a high school graduate with a certificate in office procedure and key punch operation from Central Piedmont Community College. She is also a typist. She had had three years' experience as a clerk in the United States Post Office and a year or so of experience in each of three other jobs (as a receptionist for Planned Parenthood, as a consultant for the Street Academy and as an office clerk for an employment agency). The original CETA funding was for one year. Coleman's first post, starting in July of 1975, was that of medical records clerk. In August

of 1975 she was transferred to be an accounts receivable clerk in the business office, correcting computer errors, posting payments, answering the telephone and correcting errors in patients' accounts. She worked until September, 1976, when she left because she had been denied transfer or promotion to a regular job. Between February and June, 1976, she made several requests for transfer to a permanent job and those requests were denied. She was given various reasons: that her hourly rate in the temporary job was higher than she might get in the regular job; that a supervisor placed employees "where he wanted to place them"; that she ought to be satisfied with $3.10 an hour.

When she started requesting a

permanent job, she was put under closer observation; she was given a below average rating instead of previous good ratings and was told that the CETA job could not be renewed. Her goings and comings within the hospital area were more closely supervised, especially after she filed a charge of employment discrimination with the Equal Employment Opportunity Commission in June of 1976. The elimination of the CETA job was at the request of the hospital, not of the government. Plaintiff Coleman's CETA job, in fact, was extended on September 22, 1976, for a period until January 31, 1977, but she was told by her supervisor that her employment was not being extended.

Several white employees were hired from the outside into permanent jobs after

plaintiff Coleman first started seeking a permanent job. Coleman's experience and qualifications were superior to those of the persons hired. In fact, the plaintiff was asked to show one of those persons how to do the job. Coleman's final rating, even at the time of her termination was, in fact, acceptable.

I find as facts that because of her race, plaintiff Coleman (a) was denied transfer to a permanent job; (b) was pressured out of the job by the manipulation of the CETA funding request; and (c) was harassed on the job after she filed a claim with the Equal Employment Opportunity Commission. The defendants' explanations to the contrary are pretextual. Plaintiff Coleman is entitled to appropriate relief.

12. Wilma Oliphant, a named plaintiff, was employed on August 23, 1976, as an audit and cost clerk in the business office. She was a high school graduate with two years of business courses from Central Piedmont Community College. These courses included clerical work, typing, handling office machines, business communications and filing. She had worked as a proof operator, encoding checks, at NCNB. Her job as an audit and cost clerk required allocating Medicare and Medicaid payments to the patients' vouchers or log sheets for purpose of being punched into computers. She also did filing.

From her first interview she was sexually harassed by her supervisor, Hartsell Sweatt. She was the only black employee in a group of six or seven

supervised by Sweatt. She requested transfer to other jobs to get away from Sweatt, but was not allowed transfer to any job she was then qualified for. After she complained about Sweatt and Sweatt was reprimanded, Sweatt put her under closer supervision, observing her actions and becoming more critical. It reached a climax when Sweatt instructed her to change an entry she had made on a patient's account; she told him that the record was correct and should not be changed and Sweatt fired her on the spot.

At least two white female employees complained to the supervisor about Sweatt's sexual advances. They were not, however, subjected to harassment or denial of employment opportunities nor discharge; Oliphant was the only one who received that

sort of treatment.

Oliphant's discharge on August 2,1977, was based on racial discrimination. Defendant's claim that she was discharged for putting the wrong code number on a form is pretextual. She was discharged because of her complaints to management and to the EEOC, about Sweatt and about the hospital's racial practices, and for her request for other jobs in order to avoid contact with Sweatt. Defendant's explanations, including the handling of "anecdotals," are pretextual.

I do not find that Oliphant was denied any promotion or transfer for racial reasons.

13. Terry Ragin is young, serious, brash, assertive and credible. She is a high school graduate who had two years of

college, including accounting, typing (seventy words per minute), and bookkeeping, and she had had four years of clerical experience when she was employed in February, 1976, as a collection officer in the business department. She was the only black employee in that position. She complained openly about racial prejudice and got in trouble with her supervisor, Sullivan, and fellow employees, and she got in more trouble when she started asking for a better job. Her complaints about use of the term "nigger" were brushed off by her supervisor as being too sensitive. After a number of unsuccessful requests for assignment to a more challenging job, she filed a complaint with the Equal Employment Opportunity Commission in August of 1977. This

produced an increasing number of incidents in which she reacted, sometimes strenuously, to pressure from management and fellow employees. She was denied transfer to four different jobs which she was qualified to fill between March and September, 1977. However, since she withdrew some of the requests and the record is not clear that she was requesting those jobs at the time the vacancies occurred, no relief is afforded for discriminatory refusal to promote or transfer.

A very "proper" list of "anecdotals" was written up and culminated in a well "documented" discharge on October 4, 1977. Terry Ragin was in fact discharged by defendant in retaliation against her refusal to accept her role as a black woman in a white employment society. She

was discharged for asserting her rights. She is entitled to relief on her claim for her discriminatory discharge on October 4, 1977. The reasons set out in the defendants' "documentation" of Ragin's discharge are pretextual rather than valid.

14. Bernice Howie worked at Charlotte Memorial Hospital from March 25, 1975, until August 19, 1977, as an insurance clerk. She made claims at the trial for several jobs which she said she was denied because of her race. She resigned August 8, 1977, without having asserted any claim of racial discrimination. Her claim is also complicated by the fact that she was on maternity leave for three months during which some of the jobs involved came open. I am not persuaded that she was denied any job opportunity on account of

her race.

15. Plaintiff Bertha Anderson was employed by the hospital in September 1977. She was initially assigned as a Clerk I in medical records. She is a high school graduate with additional clerical courses and clerical experience and seven or eight years of experience as a waitress. (Trial transcript, pp. 250-253.)

Anderson requested (a) a transfer to Clerk I and (b) transfer to Patient Representative. Both requests were in December, 1977. (Trial transcript, p. 243.) She was denied both jobs and contends that her rejection was racially motivated.

(a) The Clerk I position requested by Anderson, which was assigned to a newly hired white employee, would have been a lateral transfer with no increase in pay.

The job duties involved answering the telephone and giving out information about medical records to appropriate individuals. (Trial Transcript, pp. 864, 868.) The job required no specific educational training. It was an entry level position and the person assigned to the job would have to be trained. Anderson had more educational and work experience at the hospital than the person selected for the position. Anderson was more qualified for the job.

Defendants contended that lateral transfers were prohibited, that they did not have time to consider Anderson and that her conduct was unacceptable. Defendants' ban against lateral transfers has been applied disproportionately to black employees. White employees have been transferred laterally. No black

employee, however, has been allowed to do so. (Plaintiffs' Exhibit 18.) Anderson was qualified to fill the position and the job would have provided her with additional experience which would have improved her opportunities for advancement. Defendants' "no transfer" explanation is pretextual.

The other two reasons advanced by defendants for not transferring Anderson are also pretextual. Anderson was present at the hospital and working in the department where the vacancy existed. She was available for consideration if defendants wanted to consider her. The person selected did not work at the hospital and presumably had to be brought in for interviews. Additionally, no credible evidence established anything about Anderson's conduct which would disqualify her for the

position. Defendants' reasons for not transferring Anderson do not withstand scrutiny.

(b) The transfer to patient representative. Between 1975 and 1979, only one black employee was employed by defendants as a patient representative. The twenty-five other representatives are white. Patient representatives acted as liaison between the hospital and patients and their families and assisted patients with non-medical problems that developed during their hospital stay. The job required a high school education, and some "people oriented" experience was preferred. (Plaintiffs' Exhibits 63 and 122; Trial Transcript, p. 1018.)

Defendants first contended that all of the patient representative positions

had been filled at the time Anderson applied. They later contended that Anderson did not have sufficient "people oriented" experience. Neither explanation will hold water.

Anderson applied for a patient representative position on December 7, 1977. At least four white employees applied and were selected for the position after Anderson's application. Defendants' witness finally admitted at trial after being confronted with hospital records showing that applicants applied and were hired for the position after Anderson's application, that "When Ms. Anderson applied, all the jobs had not been filled." (Trial Transcript, p. 1015.)

The witness then suggested that "the real reason [was] that she wasn't qualified."

(Trial Transcript, p. 1014.) (Plaintiffs' Exhibits 63-64, 66-67.) Defendants' witness Dobbins defined "people oriented" experience as "Anything where they [applicants] dealt with the public--social workers, some kind of volunteer work." (Trial Transcript, p. 1008.) Anderson had seven or eight years of experience as a waitress. Defendants admitted that this was "people oriented" experience but suggested that this was not the type of experience they desired. White persons had been hired, however, with less "people oriented" experience than Anderson. For example, Kathleen Harris, a high school graduate (GED) whose "people oriented" work was volunteer work in a nursing home and in a political campaign, was hired as patient representative on January 8,

1978. (Plaintiffs' Exhibit 69.) In light of all of the evidence, including the limited number of black employees hired for the patient representative position, the fact that other black employees have applied unsuccessfully, the subjective criteria applied by the all-white supervisory staff, the discrimination against black employees as shown by other findings herein, and the demeanor of the witnesses, defendants' explanations for not selecting Anderson for the patient representative position are found to be pretextual.

Anderson also contends that she was discriminatorily denied a Clerk II position to which a white employee was assigned in 1978. She refused, however, to be interviewed for the position and voluntarily resigned in March, 1978.

Anderson was not certain of the date of the assignment, nor whether it occurred after Anderson resigned, and she admitted that she had refused to be interviewed for the job. She offered no evidence that she was forced out of her job. The court finds that she was not discriminatorily denied the Clerk II position and was not forced to terminate her employment with the hospital. Anderson is entitled to relief, however, for being denied transfer to the Clerk I position and to the patient representative job.

16. Class member Kim Wallace is an intelligent and credible claimant and witness. She graduated from high school at an Army base in England and came to Charlotte Memorial Hospital as a Clerk I in the personnel department in January,

1976. She promoted to Clerk II in 1978. Her experience in England had not prepared her to accept an inferior racial "place" or status. (Trial Transcript, pp. 268-269.)

Wallace complained about her inability to transfer to the wage and salary specialist job which was created during the summer of 1977. The salary specialist was expected to study and compare the job duties and wage scales of job positions at the hospital with similar jobs at other establishments, and to make recommendations for salaries and wages for the various jobs at the hospital. The position was initially advertised as requiring a college degree. The hospital was unable to attract college graduates for the position because of its projected low

salary. The personnel manager then eliminated the college degree settlement without notice to Wallace, and selected a white employee, Linda Nichols, who was junior in service to Wallace, and trained Nichols for the job.

Wallace requested the position when it was first advertised and was advised that a college degree was required. Wallace was not advised, however, when the college degree requirement was eliminated. Wallace had one year more of work experience in personnel than Nichols. Wallace had as much educational training and could have been as easily trained as Nichols. With the modification in the job description and requirements, no special skills were required. The employee was simply to make inquiries of supervisors and others about

particular job duties and pay and was then to work closely with the personnel manager in developing comparisons. Wallace was more qualified for the position than Nichols.

Defendants contended that Nichols had worked at least four or five months with employee benefits while Wallace worked as a clerk and receptionist. Wallace's duties, however, required that she provide new applicants with information about job vacancies, their duties and pay. As receptionist, Wallace was provided a list of job vacancies and would use that list to advise applicants if vacancies existed in job positions they were seeking. As clerk, she was responsible for maintaining the active and inactive files and the orientation packet for new employees, and

other clerical duties. (Trial Transcript, pp. 274-276, 281-282, 1053-1054.)

Viewing the entire record and the decorum of the witnesses, the court finds that defendants' explanations for not selecting Wallace for the position are pretextual. The job duties performed by Nichols simply required checking whether an individual was on the hospital payroll for insurance coverage, passing out and receiving evaluation forms on employees from supervisors, and indicating to payroll personnel that particular employees were entitled to wage increases as determined by their supervisors. Defendants suggest that more was involved and that because of her job duties, the person selected became familiar with the wage scales which were to be studied. (Trial Transcript, pp.

1038-1039, 1053.) However, the credible evidence establishes that the limited experience of the employee selected and the work she actually performed provided her with no greater background than Wallace to perform or to be trained for the newly created position. The employee was to be trained for the new position, however, and because of her longer relevant experience with the hospital, Wallace was more qualified than the person selected. She is accordingly entitled to relief for being denied the position.

Wallace voluntarily terminated her employment in August, 1978. She does not claim and offered no evidence that she was forced to leave. The court finds that she is not entitled to relief in connection with her resignation.

17. Lillie Ann Stewart McCain worked for Charlotte Memorial Hospital starting in September of 1960 as a nurse's assistant. She had successfully completed two years of college. She made a number of efforts to get into better work in 1961, 1965, and 1971, among other times. In the times relevant to this case she makes three claims:

> (a) Denial of transfer to data processing technician in 1977. She was denied upon the ad hoc basis that nurses' assistants could not transfer into data processing. I am not persuaded she is entitled to that job, because it did actually require certain clerical skills which she did not show she had.
>
> (b) In July, 1977, she applied for and was denied the job of surgical technician trainee. She was accepted for the training class, was hospitalized for nine days (ending five days before the class began), and then was told she had been sick too much and could not enter the class. She was denied

the surgical technician training job because of her race. Defendants' reasons to the contrary are pretextual.

(c) In November, 1977, Ms. McCain was discharged, allegedly for refusal to bathe a patient. Her discharge was retaliatory and discriminatory. She was fired without a hearing for allegedly refusing to bathe the patient, despite the facts that her supervisor had instructed her to give the patient only a partial bath and that the patient's wife, in fact, voluntarily provided whatever bath was provided while plaintiff was taking care of a more urgent errand with another patient. Defendants' alleged reasons for the discharge are pretextual and are not credited by the court. There was not even a credible "articulation" of a valid, non-racial reason for discharge.

18. Plaintiff Evelyn Alexander was first employed by defendants in July, 1973. She is a high school graduate with a year of college and extensive clerical and accounting experience. Her training and experience qualified her for a job as data processing technician. She applied for and

was promised a job of data processing technician, but was initially assigned Clerk III. She continued to seek the data processing technician position without success. A supervisor claimed that her attendance record disqualified her for promotion. That excuse is pretextual. Her absences were for legitimate reasons; no one told her she was denied the job because of attendance; and some supervisors said they did not even know she wanted to be promoted. She was denied the data processing technician job because of her race.

In 1976 she sought a lateral transfer to a vacant job as refund clerk. Defendants filled the job instead with a newly hired white woman, Regina Jennings, who had less clerical experience and was not shown to

have more college training than Alexander. Jennings left the job after a few months, and defendants assigned a CETA employee, Marla Dykes, to the job. Again, the defendants' reliance upon bad attendance to justify the denial of this opportunity to Alexander is pretextual. Plaintiff Alexander was denied the refund clerk job because of her race.

Alexander was discharged on April 3, 1978, allegedly because of excessive absences and because she left the hospital premises on March 31, 1978, and allegedly took more than an hour at lunch without previous permission. There was a background to this. Alexander had filed a charge with the Equal Employment Opportunity Commission on April 21, 1976, alleging that she was denied the refund clerk job (discussed

above) because of her race. Twenty days later, defendants started papering her file with "anecdotals" charging her with absenteeism without determining whether her absences were justified. In fact, the evidence shows that her various absences were justified. The evidence is in conflict on whether plaintiff's absence on March 31, 1978, was within regulations respecting lunch absences; there was no written policy covering the subject. In practice, the rule, whatever it is, was not consistently enforced; employees do leave the hospital premises at lunch time without obtaining permission and without punching the clock. Employees are at times allowed to combine lunch break with morning and afternoon coffee breaks. The particular absence which

brought about plaintiff's downfall was a visit to see her insurance agent; her home had been burned a day or two previously. Finally, the evidence shows, in fact, that Alexander was gone less than an hour instead of more than an hour. Defendants' offered explanations are pretextual.

19. Randy Tucker is a high school graduate with one year of college. His employment period was from March, 1971, until sometime in 1975. In 1973 he applied for transfer to a job as respiratory therapist, but did not get the position. Later, the training program for respiratory therapist was transferred to Central Piedmont Community College. Tucker filed a claim on this incident with the Equal Employment Opportunity Commission in 1973 or 1974. Later he was

discharged. Tucker is a class member, and the merits of his claim for discriminatory denial of transfer will be decided in Stage II proceedings.

20. Plaintiff Lula Bell Miller is a high school graduate and a trained practical nurse, but not a licensed nurse. At various times beginning in 1973 she sought jobs as a nurse, technician, nurse's assistant, file clerk or receptionist, all positions for which she was qualified. In 1973 she was advised by the defendants that she would be accepted for a job as nurse's assistant. However, when the defendants learned that she had filed a charge with the Equal Employment Opportunity Commission against a former employer, Presbyterian Hospital, and had received a favorable determination from

the EEOC, defendants withdrew their offer of employment. She continued to make application for employment.

The record of plaintiff's employment and claim at Presbyterian Hospital was not presented to the court. Defendants advised that they could find no record that she had applied for jobs at Memorial Hospital. The evidence does not show the nature of her qualifications compared with those who got the jobs for which she applied. Her claim should be dealt with on a more complete record in the Stage II proceedings.

21. Bertha Chisholm is a college graduate and a licensed medical technologist. She started work with defendants as a laboratory intern in 1971 and got a permanent job as medical

technician in 1972. Her performance ratings have been consistently high. In 1980 she applied for a job as assistant supervisor in her department. Defendants selected instead Lynn Springs, a white employee with only two years of experience. Springs had been selected for the job before the vacancy was announced. Also, before the vacancy was announced she was assigned some of the duties of the new job so that she could learn how to do the job.

Defendants attempted to explain their selection by saying they chose Springs because they needed a "motivator"; nobody had complained about Chisholm not being a "motivator" and she had, in fact, been given additional duties because she had done a good job. Defendants also asserted

that Springs fit the job "criteria" better than Chisholm. This explanation will not hold water, because the "criteria" were made up after the choice between Chisholm and Springs had been made. Chisholm had seven more years of work experience in the laboratory than Springs. Defendants' explanations are not credited and are pretextual. The post-decision performance review of Chisholm is not entitled to any weight because it was made up after the fact in order to support the decision. It is pretextual. Chisholm is entitled to be compensated for her loss of wages, and promoted to the original Springs job, and to any job to which that appointment might have led.

C. Brief Summary of Findings of Fact

22. In the various ways set out in the foregoing findings of fact, the defendants did unlawfully discriminate against the individuals named. They are entitled to relief from the results of that discrimination.

23. As support for the conclusions previously set forth, plaintiffs offered statistical evidence and opinions of statistical experts. Though not necessary to the formulation of the findings already recorded, plaintiffs' statistical evidence does support those findings. Defendants' statistical analyses and testimony do not refute the plaintiffs' statistical showing.

24. Specifically, the statistics demonstrated to the satisfaction of the court that:

(a) In job assignments, blacks are subjected to a disproportionately large number of lower paying job positions. This seems to be true even in the case of black employees with superior experience and qualifications. The plaintiffs' samples are adequate and fairly representative for the periods covered. and the data supporting the analyses is not seriously challenged. Defendants have not shown evidence from which it could fairly be concluded that superior experience, training and capabilities of white employees accounts for the differential assignments and the differential wages.

(b) On account of their race blacks sustained far more involuntary terminations or discharges per capita than whites in the period 1975-1979.

(c) Although several individual plaintiffs proved that they were denied promotions or transfers on account of race, the plaintiffs have not demonstrated by statistics or otherwise that in the realm of promotions as such, blacks as a class were treated in a discriminatory fashion.

25. The disparities in employment

opportunities for blacks in the form of assignments to lower paying jobs and in involuntary terminations are the result of the practices and policies which are described in the evidence and which are summarized in findings of fact 6 through 9 and in the particular findings with regard to the particular named plaintiffs.

26. In various ways, as found above, retaliation was carried out against black employees who pushed for equality or complained to outside authorities.

27. Timely charges were filed by plaintiffs Oliphant, Ragin, Howie, Anderson, Coleman, Norwood and Alexander, and by intervenors McCain and Chisholm. All received "right to sue" letters and instituted these proceedings within appropriate time limitations.

Although Norwood did not testify and is not an appropriate class representative, others relying upon his charge have appeared and testified and offered evidence, and the other named plaintiffs and intervenors are appropriate representatives and will fairly and adequately protect the interests of the class. They are represented by thoroughly competent counsel, experienced in employment discrimination cases.

CONCLUSIONS OF LAW

28. The court has jurisdiction of the suit and of the parties under the statutes above cited. The charges were timely filed and the parties are properly in court.

29. The original class certifications are modified and consolidated in light of the evidence and the findings of fact, so that the final class is hereby defined and

certified to be:

> All black employees of defendants who have worked in or have sought or have been assigned to non-professional job positions (technical, skilled, semi-skilled and labor) who, at any time since October 13, 1973, have been discriminatorily denied a job, or discriminatorily assigned to a job, or discriminatorily denied transfer to a job, or discriminatorily discharged or subjected to retaliatory treatment or actions, because of race or color.

30. Black employees, including several of the plaintiffs, have been on account of their race assigned to lower paying positions. This was a racially discriminatory policy and action. Defendants have not rebutted that showing.

31. Plaintiffs have failed to establish entitlement to class relief based upon disparities in promotion practices, although several plaintiffs and class members did demonstrate specific discrim-

ination, as to them individually, in the area of promotion. Relief will be awarded to some individuals, but no class relief will be ordered for discriminatory failure to promote.

32. Blacks as a group because of their race have been disproportionately disciplined and discharged, and subjected to retaliation for asserting their rights.

33. The plaintiffs have the burden, and have had the burden throughout, of persuading the court as to every fact material to recovery for every individual and every claim, and for a class, and as to each particular form of discrimination.

34. Defendants have not had any burden of proving anything at any time. Defendants have had the opportunity to offer evidence and otherwise to rebut any

showing plaintiffs may have made. As indicated above, in all the particulars necessary to support the findings which have been made in favor of relief for plaintiffs, the plaintiffs have carried the burden of demonstrating that they were entitled to recover, and that defendants' explanations, when offered, for discrimination were pretextual rather than legitimate. The court has heard the witnesses, and these findings are, of course, based upon the accepted methods of weighing testimony, including observation of witnesses and making judgments as to credibility.

35. Each plaintiff in whose favor facts have been found is entitled to the relief indicated above and to such relief as may be provided in Stage II

proceedings.

36. Plaintiffs are entitled to remedial orders, including orders prohibiting defendants from discriminating against black employees in job assignments, compensation, training, transfers, promotions and discharges, and from retaliating against black employees who complain of racial discrimination or seek to enforce their rights under the law.

37. An appropriate judgment will be entered.

This 20th day of June, 1983.

/s/ James B. McMillan
James B. McMillan
United States District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-78-326-M)
WILMA OLIPHANT; TERRY RAGIN;)
BERNICE HOWIE; BERTHA)
ANDERSON; and RUTH COLEMAN,)
individually and on behalf)
of all others similarly)
situated,)
Plaintiffs,)
)
-vs-)
)
CHARLOTTE MEMORIAL HOSPITAL)
and MEDICAL CENTER; and)
CHARLOTTE-MECKLENBURG)
HOSPITAL AUTHORITY,)
Defendants.)

JUDGMENT

C-C-78-370-M)
CHARLES NORWOOD; LULA B.)
MILLER; EVELYN ALEXANDER)
and YVONNE SESSOMS,)
Plaintiffs,)
-vs-)
CHARLOTTE MEMORIAL HOSPITAL)
and MEDICAL CENTER; and)
CHARLOTTE-MECKLENBURG)
HOSPITAL AUTHORITY,)
)
Defendants.)

Pursuant to findings of fact and conclusions of law being entered contemporaneously, IT IS ORDERED, ADJUDGED AND DECREED that:

1. This proceeding is certified as a class action under Rule 23 of the Federal Rules of Civil Procedure. The class as finally determined and hereby certified is:

> All black employees of defendants who have worked in or have sought or have been assigned to non-professional job positions (technical, skilled, semi-skilled and labor) who, at any time since October 13, 1973, have been discriminatorily denied a job; or discriminatorily assigned to a job, or discriminatorily denied transfer to a job, or discriminatorily discharged or subjected to retaliatory treatment or actions, because of race or color.

2. The defendants and all persons in concert or participation with them are enjoined and restrained from discriminating against plaintiffs and members of the class

herein defined on the basis of race in initial or later job assignments, transfers and discharges and training, and from retaliating against plaintiffs and class members who challenge or seek to enforce their rights to equal employment opportunity under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

3. Defendants shall within ten days from the entry of this judgment, or as soon as vacancies develop, reinstate or offer reinstatement, promotion or employment (into the jobs denied them or comparable jobs) to the following persons, who have demonstrated that for racial reasons they were wrongfully denied employment as follows:

> Pamela Bennett was denied transfer in September, 1981, to the job as patients' account officer in the business office, and in March, 1981, to the

job of administrative assistant in the maintenance office.

Ruth Coleman was denied the permanent job she sought at the time of her termination at the end of September, 1976.

Wilma Oliphant was wrongfully discharged on August 2, 1977.

Terry Ragin was discharged on October 4, 1977 on account of her race.

Bertha Anderson in December, 1977, was denied a lateral transfer to Clerk I and a job as patient representative.

Kim Wallace was denied transfer in the summer of 1977 to the newly created wage and salary specialist job.

Lillie Ann Stewart McCain was denied the job of surgical technician trainee in July, 1977, and was discharged in November, 1977.

Evelyn Alexander (a) was denied a data processing job which had been promised upon initial employment; (b) was denied a transfer to a vacant job as refund clerk in 1976; and (c) was discharged on April 3, 1978.

Bertha Chisholm was denied appointment as assistant supervisor in the laboratory in 1980, her entitlement to begin with the date when Lynn Springs actually became assistant supervisor.

4. If the parties are unable to agree within thirty (30) days from the date of this judgment on the job positions which the above-named individuals should be offered, or to which they are entitled under this judgment to be promoted or assigned, those issues shall be referred to the special master by separate order for appropriate recommendations.

5. Defendants shall pay back pay to all the individuals named in paragraph 3 above, for any loss of pay they have sustained because of the employment practices found herein to have been unlawful. Their loss of pay shall be based on the differences in their earnings from the dates of defendants' discriminatory practices but no earlier than October 13, 1973, until these plaintiffs and class members have been reinstated, offered

appropriate employment or promotion or transfer, or assigned to job positions as herein provided. The amounts awarded shall represent the difference between what they would have earned had they not been discriminated against and what they have earned or should have earned through reasonable diligence. They shall also be awarded front pay until they have been placed in the job positions as directed herein. The amount of back or front pay to be awarded to these plaintiffs and class members shall be referred to the special master for recommendations.

6. The claims of Randy Tucker and Lula Belle Miller, and any other class members whose claims are not specifically decided in this judgment, will be referred to the special master for recommendations.

7. Members of the class who have been discriminatorily treated in any of the ways described in the class certification are entitled to relief. They shall be reinstated in employment, promoted or transferred or employed where appropriate and assigned to the job positions they would now occupy but for defendants' discrimination and shall be awarded any loss of earnings they have suffered as a result of defendants' racially discriminatory practices.

8. In proceedings before the master, class members found entitled to recover may be awarded back pay, starting not earlier than October 13, 1973, until they have been placed in the job positions they would now occupy had they not been subjected to defendants' racially discriminatory employ-

ment practices. The special master shall receive evidence from the interested parties and, based on the instructions which will be given in a separate order, shall make proposed findings and recommendations with respect to any injunctive relief and the amount of back pay each class member shall receive. The master shall receive evidence and make recommendations regarding any front pay that should be awarded to class members.

9. Plaintiffs and members of the class are awarded adjustments in fringe benefits to reflect what the fringe benefits would have been in the absence of defendants' discriminatory practices. They shall also be awarded interest from the date of the discrimintory acts of the defendants calculated at the "adjusted prime rate"

used by the Internal Revenue Service in cases of income tax refunds or penalties compounded monthly. The master shall receive evidence from the interested parties and, based on the court's instructions, shall make proposed findings and recommendations with respect to any adjustments in fringe benefits and the interest that should be awarded to plaintiffs and individual class members.

10. Within six (6) months from the date of this judgment, defendants shall also take the following steps to eliminate the remaining effects of their discriminatory employment practices:

Defendants shall:

(a) Post notices of all non-professional openings at the hospital, as well as openings in entry level professional and supervisory positions. Employees are to be given three

business days to bid on such vacancies. The notice must contain a brief description of the job, duties of the job, pay rate, and the name of the person to whom the employee is to submit his or her bid. The hospital is to maintain a list of employees who submit bids. This list is to be used as a source of filling future vacancies.

(b) Canvass the class members herein described and determine if they are interested in and are qualified for professional, technical, para-professional, skilled management, and supervisory positions. This canvassing is only to use education, license and registration requirements, length of service, job performance and other job related criteria to determine if black employees are qualified. A list of names of those qualified shall be maintained, and updated once every six months during the period the court retains jurisdiction of this action. Interested class members who are not qualified for job positions in which they express an interest shall be informed in writing and shall be advised what they need to do in order to qualify.

(c) Establish job descriptions for all professional, technical, clerical, skilled and semi-skilled job positions

of the hospital and establish objective, job related criteria for the selection of candidates for the positions.

(d) Establish job related criteria for the evaluation of job performances of all non-professional employees.

11. Within six (6) months from the date of this judgment, defendants shall provide plaintiffs' counsel with the following reports:

(a) The number of white and black employees assigned to each job and department or division of the hospital;

(b) The name of each class member who has been promoted or transferred since the date of this judgment, the job position and rate of pay of the position to which the class member was transferred and his or her previous job position and rate of pay;

(c) The name of each class member whose request for promotion or transfer was denied and the reason or reasons for the denial;

(d) The name of each class member who has been involuntarily discharged

since the date of this judgment, the date of the discharge and the reason or reasons therefor (defendants shall retain records of each class member who has been involuntarily discharged);

(e) The name of each class member who has expressed an interest in job positions listed in paragraph 12 above, the job position requested and whether that person has been included in the list of employees who are to be considered for future vacancies; and

(f) The name of each class member who has expressed an interest in the job positions listed in paragraph 12 who has been determined by defendants to be unqualified and the reason or reasons for the determination.

Defendants shall provide plaintiffs' counsel with additional reports covering the above subjects every twelve (12) months thereafter during the court's retention of jurisdiction of this action.

12. Defendants shall file a report with the court within forty-five (45) days from the date of this judgment, and shall

serve copies of the report on plaintiffs' counsel, certifying defendants' compliance with paragraph 3 of this judgment and shall indicate the job positions offered to or to which the plaintiffs and class members listed in that paragraph have been assigned or promoted, together with the date of the offer or assignment. If a plaintiff or class member rejects the offer, defendants shall indicate the date of the rejection.

13. Defendants shall designate an individual who will be responsible for preparing and submitting the reports provided for in this judgment and for insuring compliance by defendants with all other provisions herein. The name, job title, and address of the person designated shall be provided to plaintiffs' counsel within thirty (30) days from the date of this

judgment.

14. Plaintiffs are the prevailing parties in this action. The defendants shall pay plaintiffs' reasonable attorney fees, costs and expenses, including expert witness and consultation fees, paralegal time and unusual clerical time for all work performed in this proceeding until the date of this judgment in accordance with an order to be entered regarding fees and expenses.

15. Plaintiffs' counsel shall also receive reasonable attorney fees, costs and expenses, including paralegal time and other proper expenses, for all future work done on behalf of the plaintiffs and class members for all proceedings before the special master and for work done in the implementation of this judgment, including

fees and expenses for monitoring and examining the various reports required, in answering questions of class members and in investigating any alleged violations of this judgment.

16. The action as to Bernice Howie is dismissed with prejudice. Bertha Anderson's claims that she was denied a Clerk II position and constructively discharged, Terry Ragin's claim that she was discriminatorily denied promotional opportunities, Lillie Ann Stewart McCain's claim of entitlement in 1977 to the job of data processing technician, and Wilma Oliphant's claim that she was discriminatorily denied a promotion are also dismissed with prejudice. As to the other claims of Anderson, Ragin and Oliphant, and those claims of the

other plaintiffs and class members where the court has found liability, the court will retain jurisdiction of the action for three (3) years from the entry of this judgment. The status of the action will be reviewed at that time and the action will be dismissed or retained as may then be appropriate.

This 21 day of June, 1983.

s/ James B. McMillan
James B. McMillan
United States District Judge